Supreme Court, U. S.
FILED
DEC 8 1979

No. 79-614

In the Supreme Court of the United States

OCTOBER TERM, 1979

STOUDT'S FERRY PREPARATION COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
DOUGLAS N. LETTER
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 602 F.2d 589. The order (Pet. App. 13a-14a) and oral decision (Pet. App. 15a-19a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1979. The petition for a writ of certio-

rari was filed on October 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly sustained the determination by the Secretary of Labor that petitioner's facility, which processes material dredged from an adjacent river into anthracite fuel and sand and gravel, is a "mine" subject to the coverage of the Federal Mine Safety and Health Act of 1977.

2. Whether the Federal Mine Safety and Health Act of 1977, in authorizing warrantless safety inspections of mines, is constitutional.

STATEMENT

Petitioner operates a facility adjacent to the Schuylkill River in Pennsylvania. Petitioner purchases material dredged from the river by the Commonwealth of Pennsylvania and moves it by front-end loader and conveyor belt from a basin adjoining the river into its plant. In the plant, petitioner separates the material into piles of burnable and non-burnable material. The non-burnable material is sold by petitioner as sand and gravel, while the burnable material is sold to a utility company as "usable anthracite refuse" (Pet. App. 2a-3a).

After a federal safety inspector was denied entry into petitioner's facility in May 1978, the Secretary of Labor filed suit in the United States District Court for the Eastern District of Pennsylvania to

enjoin petitioner from interfering with administrative inspections mandated by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (and Supp. I) 801 *et seq.* (Pet. App. 3a-4a). Following a hearing, the district court granted the injunction, rejecting petitioner's contention that its facility is not a "mine" under the Act (*id.* at 13a-14a).[1] The district court based its decision on two alternative grounds (*id.* at 19a). The court first found that petitioner's plant is a coal preparation facility and thus within the statutory definition of a "mine." In so holding, the district court concluded that the Act does not limit the term "mine" to facilities involved in extracting materials from their natural deposits (*id.* at 16a). In addition, the court found that petitioner's plant constitutes a "mine" under the Act because it is a mineral preparation facility for sand and gravel (*id.* at 16a, 18a-19a). The district court granted petitioner a stay pending appeal (*id.* at 5a, 14a).[2]

On petitioner's appeal, the court of appeals affirmed (Pet. App. 1a-12a). The court, relying on the legislative history of the Act, found that Congress intended the term "mine" to be given "the broadest

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[1] Petitioner also contended that warrantless inspections are unconstitutional. The district court did not specifically address this issue but, by granting the injunction, implicitly found that such inspections are permissible.

[2] At petitioner's request, the district court also issued an order protecting against unauthorized disclosure of technical processes used in petitioner's facility (Pet. App. 19a).

possible interpretation [with] doubts * * * resolved in favor of inclusion of a facility within the coverage of the Act" (Pet. App. 7a). The court also found no requirement in the Act that a coal preparation facility, to be a "mine," must be engaged in extracting coal from its natural deposits (*ibid.*). Furthermore, the court determined, as an independent ground, that petitioner's plant satisfied the Act's definition of a "mine" because of its separation activity involving sand and gravel (*id.* at 8a).

The court of appeals rejected the argument that the provision of the Act authorizing warrantless safety inspections of mines is unconstitutional (Pet. App. 12a). The court found that mining is a pervasively regulated industry and therefore within an established exception, recently reaffirmed in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978), to the warrant requirement. The court also distinguished the holding in *Barlow's*—that warrantless inspections under the Occupational Safety and Health Act of 1970 are unconstitutional—on the grounds that the Federal Mine Safety and Health Act of 1977 applies only to a single industry, that the mining industry has a history of pervasive governmental regulation, that serious mining accidents have long been an acknowledged problem, and that the Mine Safety Act's inspection provisions are limited, closely defined, and reasonable (Pet. App. 8a-12a).

ARGUMENT

1. Petitioner contends (Pet. 9-12) that its facility is not a "mine" within the meaning of the Federal Mine Safety and Health Act of 1977. This contention, raising only an issue of statutory construction on which there is no conflict in the circuits, does not warrant review by this Court.

Moreover, the decisions of the courts below are correct. By its terms, the Act covers "structures, facilities, * * * or other property * * * used in * * * the work of preparing coal or other minerals * * *" without regard to the extraction of such minerals from their natural deposits. 30 U.S.C. (Supp. I) 802(h)(1) (Pet. App. 21a-22a). Hence, the literal language of the Act embraces petitioner's activities of preparing "a burnable product 'akin' to coal" (*id.* at 7a) and of preparing sand and gravel (*id.* at 8a). In addition, the legislative history cited by the court of appeals (*id.* at 6a-7a) demonstrates Congress' intent that the scope of the Act be broadly interpreted and that doubts be resolved in favor of coverage. Thus, in sustaining the Secretary's construction, the courts below correctly gave effect to the clear language and history of the Act. As the court of appeals concluded (*id.* at 7a; footnote omitted): "Although it may seem incongruous to apply the label 'mine' to the kind of plant operated by [petitioner], the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it—the word means what the statute says it means."

2. The court of appeals also correctly upheld the constitutionality of the Act in authorizing administrative safety inspections of mines to be conducted without warrants (Pet. App. 8a-12a). Petitioner argues (Pet. 12-15), however, that the court of appeals' decision conflicts with *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

In *Barlow's*, this Court held that warrantless searches under the Occupational Safety and Health Act of 1970 are not constitutionally permissible. However, the Court reaffirmed the exception to the warrant requirement for statutorily authorized warrantless searches of "'pervasively regulated business[es]'" and "'closely regulated' industries 'long subject to close supervision and inspection.'" *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313. See *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).[3] Although *Barlow's* refused to extend the exception for pervasively regulated businesses to all industries covered by OSHA, the Court indicated that its decision was limited to OSHA searches and that the reasonableness of warrantless searches under other statutes would "depend upon the specific enforcement needs and privacy guarantees of each [regulatory] statute" (436 U.S. at 321). In particular, the Court recognized that "[s]ome * * * statutes

[3] As the Court explained in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973), "[t]he businessman in a regulated indsutry in effect consents to the restrictions placed upon him."

* * * apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply" (436 U.S. at 321).

In this case, the court of appeals concluded that warrantless safety inspection under the Federal Mine Safety and Health Act of 1977 satisfied the *Barlow's* standard of reasonableness (Pet. App. 10a, 12a). The court found that, unlike the electrical and plumbing business in *Barlow's*, mining has long been subject to pervasive governmental regulation (*id.* at 9a, 10a, 12a). See *United States* v. *Consolidation Coal Co.*, 560 F.2d 214, 220 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, reaffirmed on remand, 579 F.2d 1011 (1978), cert. denied, 439 U.S. 1069 (1979). Moreover, unlike OSHA, the Mine Safety Act applies to a single industry with an acknowledged history of serious accidents (*id.* at 9a, 10a-11a)—according to Congress, "the most hazardous occupation in the United States" (H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 1 (1969)). In addition, again unlike OSHA, the Mine Safety Act mandates period inspections and specifically directs that no advance notice be given for safety or compliance inspections (*id.* at 11a).[4] Finally, the Act provides for the Secretary to seek immediate judicial review if the party to be inspected denies warrantless entry, so that no sanctions are summarily imposed for refusing to allow

[4] As the court of appeals observed (Pet. App. 10a), Congress was concerned that advance notice of inspections would impair the Act's objectives because of the ease with which safety or health hazards could be concealed.

a warrantless inspection and, as occurred here, any unusual privacy expectations can be accommodated in the judicial proceeding (Pet. App. 11a-12a). Thus, finding that the inspection provisions of the Mine Safety Act are more limited, more closely defined, and more narrowly drawn than those of OSHA (*id.* at 9a, 11a), and that there is "consequently less likelihood of the abuses of 'unbridled discretion of executive and administrative officers' which *Barlow's* found objectionable" (*id.* at 11a), the court of appeals held that warrantless inspections pursuant to the Mine Safety Act are not invalid under *Barlow's*.

Petitioner argues (Pet. 13-14) that the court of appeals erred in distinguishing *Barlow's* because preparation facilities for coal and other minerals have not had a long history of close regulation. Even assuming this factual contention to be true, the decision of the court of appeals is nonetheless correct. In *United States* v. *Biswell, supra*, this Court rejected the notion that the exception for pervasively regulated industries applies only when there exists a long history of regulation. As the Court stated (406 U.S. at 315), "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably of central importance * * *." Similarly, "close scrutiny" is clearly of overriding importance under the Federal Mine Safety and Health Act of 1977, and, as in *Biswell*, "[l]arge interests are at stake" (406 U.S. at 315).

The statement of congressional purpose in the Act demonstrates the crucial function served by federal regulation of mine safety. See 30 U.S.C. (Supp. I) 801 (Pet. App. 20a-21a). The substantive provisions of the Act also reveal the breadth of federal regulation, including development of mandatory safety and health standards (30 U.S.C. (Supp. I) 811), frequent inspections of all mines to enforce those standards (30 U.S.C. (Supp. I) 813), and authority to order the immediate withdrawal of all miners from areas where dangerous working conditions are found to exist (30 U.S.C. (Supp. I) 817). Moreover, petitioner operates a facility that is part of the larger mining industry. As the court of appeals found (Pet. App. 9a, 10a, 12a), that industry has been the focus of government regulation for many years. Especially in these circumstances, Congress has broad authority to draw statutory boundaries as it deems necessary to promote the public interest, and it could legitimately treat petitioner as part of the class of activity subject to the Federal Mine Safety and Health Act of 1977.

Petitioner also asserts (Pet. 12-13) that the court of appeals' decision conflicts with decisions of other courts. However, petitioner relies on several district court orders concerning preliminary injunctions. In each of these cases, the issue was the likelihood of the movant's success on the merits, and the district court's rulings were thus only provisional. Furthermore, the only other court of appeals to have addressed the issue of warrantless inspections under

the Federal Mine Safety and Health Act of 1977 has explicitly agreed with the decision in this case. See *Marshall v. Nolichuckey Sand Co.*, No. 79-1111 (6th Cir. Oct. 5, 1979).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
DOUGLAS N. LETTER
Attorneys

DECEMBER 1979

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[5] The court of appeals' decision in this case is also consistent with *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (three-judge court). Appeals of district court decisions upholding the constitutionality of warrantless mine inspections are currently pending in three other circuits. See *Sink* v. *Andrus*, No. 77-2614 (4th Cir.); *Marshall* v. *The Texoline Co.*, No. 79-2372 (5th Cir.); and *Marshall* v. *Wait*, No. 78-2345 (9th Cir.).

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